

February 29, 2012

Sue Mitchell
District Clerk
Truckee-Donner Recreation and Park District
8924 Donner Pass Road
Truckee, California 96161

**RE: Your Request for Advice
Our File No. A-12-011**

Dear Ms. Mitchell:

This letter is in response to your request for advice on behalf of Peter Werbel, a member of the Board of Directors for the Truckee-Donner Recreation and Park District, regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹

Please note this letter is based on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

In addition, our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest laws such as common law conflict of interest.

QUESTIONS

1. May Board Member Werbel participate in a decision to reallocate \$4 million originally allocated to the Performing Arts Center to another project, the aquatic center when Mr. Werbel owns real property within 500 feet of the Performing Arts Center but is more than 500 feet of the aquatic center?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

2. If the decision made by the Board were to have a zero or negative impact on Mr. Werbel's real property, would that change the decision as to whether or not he can participate in the Board's decision regarding the Performing Arts Center?

3. In the future, if any funds are allocated to the Community Art Center (which has been proposed to be turned into the Performing Arts Center, which is located within 500 feet of Mr. Werbel's real property) can Mr. Werbel vote or participate in those decisions?

CONCLUSIONS

1. Board Member Werbel may not participate in decisions related to whether to reallocate funds from the Performing Arts Center to the aquatic center because he owns real property within 500 feet of the property that is the subject of the governmental decision and he is presumed to have a disqualifying conflict of interest. However, there may be certain decisions in which Mr. Werbel can participate if they are not inextricably interrelated to the decisions in which he has a conflict. (See discussion below.)

2. Board Member Werbel may not participate in a decision regarding the Performing Arts Center if the decision would have a positive or negative impact on Mr. Werbel's property, because so long as there is even one penny's effect upon Mr. Werbel's property he would have a conflict of interest. However, in the unlikely event that Board Member Werbel will be able rebut the presumption of materiality and show that there will be zero impact on his property as a result of his participation in the decisions you have described, then he may participate.

3. Board Member Werbel may not participate in future decisions that are related to the Community Art Center if there will be a material financial effect upon his real property.

FACTS

You are the District Clerk for the Truckee-Donner Recreation and Park District (the "District") and are writing on behalf of Peter Werbel who is a member of the Board of Directors (the "Board") for the District. The Board will be making decisions regarding whether to reallocate funds originally dedicated to the Performing Arts Center, to another project, the aquatic center.

Board Member Werbel owns a commercial storefront property that he rents out to a snowboard shop. This commercial property is within 500 feet of the District's existing Community Art Center building. The district has allocated \$4 million to turn the building into a Performing Art Center.

You previously asked whether or not Board Member Werbel would be allowed to participate in the Board's discussions involving what items should be placed on a proposed bond measure and the eventual vote on whether to include the bond measure on a potential 2011

ballot. The answer provided by the FPPC in an Advice Letter dated December 6, 2010, informed you that participation by Board Member Werbel would be considered a conflict of interest.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a “financial interest” in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the governmental decision will have a material financial effect on one or more of the public official’s economic interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision, which we apply to your question. (Regulation 18700(b)(1)-(8).)

Step One: Is Board Member Werbel a “public official?”

The Act’s conflict-of-interest provisions apply only to “public officials.” (Sections 87100, 87103; Regulation 18700(b)(1).) A “public official” is “every member, officer, employee or consultant of a state or local government agency (Section 82048.) As a member of the Board, Board Member Werbel is a public official within the meaning of the Act.”²

Step Two: Is Board Member Werbel making, participating in making, or influencing a governmental decision?

A public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Regulation 18702.1.)

A public official “participates in a governmental decision” when, acting within the authority of his or her position and without significant intervening substantive review, the official negotiates, advises, or makes recommendations to the decisionmaker regarding the governmental decision. (Regulation 18702.2.)

A public official is attempting to use his or her official position to influence a decision if, for the purpose of influencing, the official contacts or appears before any member, officer, employee, or consultant of his or her agency. (Regulation 18702.3.) Board Member Werbel is making, participating in making, or influencing a governmental decision when acting in his role as a board member.

Regulation 18702.3(a) provides that with regard to a governmental decision within or before the official’s own agency, or any agency appointed by or subject to the budgetary control

² Because Board Member Werbel’s position is not one listed in Section 87200 he is not required to leave the room or announce his conflict of interest to the audience as listed in Regulation 18702.5.

of the official's agency, the official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, the official contacts, or appears before, or otherwise attempts to influence, any member, officer, employee or consultant of the agency.

However, Regulation 18702.4 provides an exception to the above rule. It states that a public official may appear before his or her agency as any other member of the general public in the course of its prescribed governmental function in order to represent himself or herself on matters related solely to his or her "personal interests." Such an appearance, properly made, does not constitute making, participating in making, or influencing a governmental decision. (Regulation 18702.4(a)(2) and 18702.4(b)(1).)

An official's "personal interests" include, but are not limited to, an interest in *real property* that is *wholly owned by the official or members of his or her immediately family*. (Regulation 18702.4(b)(1)(A).) If this exception applies, Board Member Werbel must limit his comments to his personal interests, and should make clear that he is not speaking in the interest of any other person or group, and that he is not acting in any official capacity. (*Burns* Advice Letter, No. A-06-178, citing to *McHugh* Advice Letter, No. 1-98-324; *Gallagher* Advice Letter, No. 1-94-279; and *Larsen* Advice Letter, No. A-87-151.)

Furthermore, Board Member Werbel may not discuss his support or opposition to a decision in which he has a conflict of interest with other district officials, board members, employees or consultants outside of any public Board meetings. (*Simonian* Advice Letter, No. A-08-096; *Burns* Advice Letter, No. A-06-178, citing *McHugh* Advice Letter, No. I-98-324.)

Step Three: What are Board Member Werbel's "economic interests?"

A public official has a financial interest in a decision within the meaning of Section 87103 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any one of five enumerated economic interests, including:

- An economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more (Section 87103(a); Regulation 18703.1(a)); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d); Regulation 18703.1(b));
- An economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more (Section 87103(b); Regulation 18703.2);
- An economic interest in any source of income, including promised income, aggregating \$500 or more within 12 months prior to the decision (Section 87103(c); Regulation 18703.3);

- An economic interest in any source of gifts to him or her if the gifts aggregate to \$420 or more within 12 months prior to the decision (Section 87103(e); Regulation 18703.4);
- An economic interest in his or her personal finances, including those of his or her immediate family -- this is the “personal financial effects” rule (Section 87103; Regulation 18703.5).

From the facts you submitted, the only economic interest indicated is Board Member Werbel’s economic interest in real property. Because you have not provided any facts indicating that any other economic interest may be affected, our analysis is limited to Board Member Werbel’s interest in his real property.³

Step Four: Is Board Member Werbel’s economic interest directly or indirectly involved in the decision?

Regulation 18704.2(a) states that real property in which a public official has an economic interest is *directly* involved in a governmental decision if any of the following apply:

“(1) The real property in which the official has an interest, or any part of that real property, is located within 500 feet of the boundaries (or the proposed boundaries) of the property which is the subject of the governmental decision...

“(2) The governmental decision involves the zoning or rezoning, annexation or deannexation, sale, purchase, or lease, or inclusion in or exclusion from any city, county, district or other local governmental subdivision, of the real property in which the official has an interest or a similar decision affecting the real property
...

“(3) The governmental decision involves the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use or uses of the real property in which the official has an interest.

“(4) The governmental decision involves the imposition, repeal, or modification of any taxes or fees assessed or imposed on the real property in which the official has an interest.

“(5) The governmental decision is to designate the survey area, to select the project area, to adopt the preliminary plan, to form a project area committee, to certify the environmental document, to adopt the redevelopment plan, to add territory to the redevelopment area, or to rescind or amend any of the above

³ A public official always has an economic interest in his or personal finances. However, any financial effect a decision may have on Board Member Werbel’s real property is considered an effect on his real property interests and would not be analyzed separately under the “personal financial effects” rule. (Regulation 18705.5(a).) Because you do not include information suggesting this economic interest is implicated, we do not discuss it further.

decisions; and real property in which the official has an interest, or any part of it is located within the boundaries (or the proposed boundaries) of the redevelopment area.

“(6) The decision involves construction of or improvements to, streets, water, sewer, storm drainage or similar facilities, and the real property in which the official has an interest will receive new or improved services.”

Board Member Werbel’s real property is located within 500 feet of the existing Community Art Center. Therefore his real property would be directly involved in any decision regarding the Performing Arts Center.

Step Five: What is the applicable materiality standard?

Regulation 18705.2(a)(1) provides the materiality standard for directly involved real property as follows:

“The financial effect on the real property is presumed to be material. This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision *will have any financial effect* on the real property.” (Emphasis added.)

Under this rule, the financial effect of the decision is material even if it has only a one penny effect. This is known as the “one penny rule.” In order to rebut the presumption, one would have to establish that the decision would not even affect the property’s value by one cent.

Step Six: Reasonably Foreseeable

Once a public official has determined the materiality standards applicable to each of his or her economic interests, the next step is determining whether it is “reasonably foreseeable” that the standard will be met. A material financial effect on an economic interest is “reasonably foreseeable” if it is substantially likely that one or more of the materiality standards will be met as a result of the governmental decision. (Regulation 18706(a).) An effect need not be certain to be considered “reasonably foreseeable,” but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.)

Ultimately, whether a material financial effect is foreseeable at the time a decision is made depends on facts and circumstances peculiar to each case. (*In re Thorner, supra*, at 198.) Because the Commission does not act as a finder of fact in providing advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), the foreseeability of a particular financial effect is a determination that must be left, in most instances, to the informed judgment of the public official.

While ultimately the determination of whether the financial effect is material must be left up to Board Member Werbel's informed judgment, the financial effect on Board Member Werbel's economic interest in his real property is *presumed to be material* because the property is within 500 feet of the property subject to these governmental decisions. Additionally, given the magnitude of the decision – a reallocation of \$4 million in funds for improvements - it is reasonably foreseeable that the decision would have more than a one penny effect on Board Member Werbel's property.

Accordingly, Board Member Werbel may not make, participate in making, or influence governmental decisions regarding the reallocation of funds from the Performing Art Center to the aquatic center, unless he can rebut the presumption of materiality by showing that his participation in the governmental decision will not have any reasonably foreseeable material financial effect upon his economic interest either positively or negatively.

Steps Seven and Eight: Public Generally & Legally Required Participation

Even if an official has a conflict of interest, disqualification is not required if the governmental decision affects the public official's economic interests in a manner that is indistinguishable from the manner in which the decision will affect the public generally. (Section 87103; Regulation 18707(a).)

Additionally, in certain rare circumstances, a public official may be called upon to take part in a decision despite the fact that the official may have a disqualifying conflict of interest under the "legally required participation" exception. This exception applies only in certain very specific circumstances where the government agency would be paralyzed from acting. (Section 87101; Regulation 18708.)

You have not presented any facts indicating that the "public generally" or the "legally required participation" exceptions are applicable to Board Member Werbel's circumstances, so we will not address them further.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Emiko Burchill
Executive Fellow

EB:sb